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No. 79-1171

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

STATE OF MINNESOTA,

Petitioner,

v.

CLOVER LEAF CREAMERY CO., ET AL.,

Respondents.

ON A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MINNESOTA

BRIEF OF MID-AMERICA LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF AMICUS

This brief is submitted as *amicus curiae* on behalf of Mid-America Legal Foundation (*"Mid-America"*). The written consents of all parties are filed with the Clerk of the Court.

Mid-America, based upon its expertise and purpose, has an interest in the disposition of the case which is before this Court on a writ of certiorari to review the judgment and opinion of the

Supreme Court of Minnesota invalidating Minnesota Statute § 116 F.21-22 in *Minnesota* v. *Clover Leaf Creamery Co.*, 289 N.W. 2d 79 (Minn. 1979).

Mid-America was organized in 1975 as an Illinois not-for-profit corporation to engage in non-partisan legal research, study and analysis for the benefit of the general public as to the effect of evolving concepts of law on our democratic institutions. Mid-America takes special interest in questions of law of a national scope that originate in or have a direct effect on the Mid-America region, namely Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio and Wisconsin. It has an interest in this case because the Minnesota statutory ban on the sale of milk in plastic containers violates both the Equal Protection Clause of the Fourteenth Amendment and the Commerce Clause of the United States Constitution. The statute lacks any rational basis in fact and unduly burdens interstate dairy and plastic industries in an effort to protect local paperboard interests. If this legislation is allowed to stand, it could open floodgates for other measures protecting local interests from competition.

Since our economic unit is the nation and not the separate states, *see M. P. Hood & Sons* v. *DuMond*, 336 U.S. 525, 537-8 (1949), this Court should affirm the judgment of the Supreme Court of Minnesota. The statute reflects the very type of economic protectionism which the Commerce Clause was designed to prevent.

SUMMARY OF ARGUMENT

The Minnesota ban on plastic milk containers violates the Equal Protection Clause because the statutory discrimination is not rationally related to the objectives of the Act. The stated objectives of the law were to solve the state's waste management problem and to encourage recycling. However, a statutory classification regulating only plastic and not paperboard milk containers is irrational because the plastic is no worse than the paperboard in terms of any of the stated environmental objectives. With respect to several of such environmental concerns all available evidence confirmed that the plastic is superior.

Although a legislature need not formulate laws which strike at every possible evil at once, and may implement legislation "one step at a time," equal protection requires, at a minimum, that the first step taken by the legislature be rationally related to its objectives. A ban on the plastic containers which leaves the paperboard containers unregulated is actually a step backward from the environmental goals of the Act.

Under the Commerce Clause, the state power to regulate commerce is limited because Congress has sole power to regulate commerce among the several states. Consequently, this Court and not the state legislatures must be the final arbiter of the reasonability of local limitations upon the free flow of interstate commerce. Where the burden on commerce outweighs the state's interest in its local purpose, the statute will be voided. Here, the statute bans a number of interstate commercial activities and, thus, substantially impedes the flow of interstate commerce. This discrimination is weighed against a desire to protect in-state industry, a purpose which this Court has consistently refused to entertain. Further, the statute does not advance environmental goals. Thus, this discriminatory ban on plastic milk containers fails to produce the desired results, fails to provide the most efficient or effective alternative, and violates the Commerce Clause.

ARGUMENT

1. The Minnesota Statute Banning the Sale of Milk in Nonreturnable, Nonrefillable Plastic Containers Violates the Equal Protection Clause Because it has No Rational Basis in Fact.

The ban on plastic milk containers effected by Minn. Stat. § 116 F.21-22 which purposefully leaves paperboard milk containers unregulated is not rationally related to the environmental objectives stated in the Act and, therefore, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The test for evaluating state statutes challenged on equal protection grounds was set forth by this Court in *New Orleans* v. *Dukes,* 427 U.S. 297 (1976):

> Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions, such as race, religion or alienage, our decisions presume the constitutionality of the statutory discrimination and require only that *the classification challenged be rationally related to a legitimate state interest.* 427 U.S. at 303 (emphasis supplied).

Clearly, the *purported* goals of the Minnesota statute to reduce solid waste disposal problems and to conserve energy and natural resources are legitimate state interests. However, this *amicus* maintains, and the Minnesota courts have decided, that the actual purpose of this Act was to effect an impermissable preference for local paperboard interests. The ban on plastic milk containers eliminates a product which causes fewer adverse environmental consequences than its unregulated paperboard counterpart. Thus, the purpose behind the Act was not to advance environmental concerns but:

> "to promote the economic interests of certain segments of the local dairy and pulpwood industries at

> the expense of the economic interests of other segments of the dairy industry and the plastic industry [,]" (Pet. Cert. App. at A-29.)

and

> "to isolate from interstate competition the interests of certain segments of the local dairy and pulpwood industries." (Pet. Cert. App. at A-27.)

The district court and the Supreme Court of Minnesota correctly invalidated the statute after examining and reexamining both the legislative history and the evidence relating to the environmental impact of both plastic and paperboard containers. As this Court stated in *Williams* v. *Rhodes,* 393 U.S. 23 (1968):

> In determining whether a state law violates the Equal Protection Clause, we must consider *the facts and circumstances behind the law, the interests which the state claims to be protecting and the interests disadvantaged by the legislation.* 393 U.S. at 30. (emphasis supplied)

The trial court appropriately noted that it "may not substitute its judgment for that of the legislature as to the wisdom or desirability of the act." (Pet. Cert. App. at A-29.) However, in their review of the evidence, both Minnesota courts found that plastic milk containers are no worse than paperboard containers with respect to any of the stated environmental concerns. Moreover, with respect to several of the stated concerns, plastic milk containers are environmentally preferable to paperboard.

Plastic containers are inert and contribute to landfill stability, an important factor in future use of the land. Additionally, they burn completely and do not emit noxious gases. Paperboard containers, on the other hand, decompose and cause the formation of leachates which seep into the ground and contaminate groundwater. (Record at 72-73, 385, 594,

692; Pet. Cert. App. at A-6, A-25-26.) They do not burn as efficiently as plastic containers and they do emit noxious gases. (Record at 69-70; Pet. Cert. App. at A-6, A-25-26.)

The evidence also revealed that the amount of crude oil and natural gas used for producing plastic nonrefillables is negligible. Thus, a ban on these containers would not materially increase the volume of natural gas or oil available for other purposes. (Pet. Cert. App. at A-12.) Moreover, the plastic milk containers were recyclable, whereas the paperboard were not. In fact, Clover Leaf Creamery already had initiated its own recycling program. (Pet. Cert. App. at A-9 n.14.)

In sum, the evidence conclusively demonstrated that the statute's actual purpose was to give certain local interests an advantage and that the statute's purported goal of reducing energy waste would be hindered by a ban on plastic milk containers. On the evidence, it was impossible to conceive of any state of facts that could justify this statutory discrimination, *McGowan* v. *Maryland,* 366 U.S. 420 (1961). Therefore, this Court should affirm the judgment of the Supreme Court of Minnesota that there was no rational basis for banning plastic but not paperboard containers for milk in order to conserve energy and natural [non-renewable] resources or to facilitate waste management.

It is well established that legislation will not fail merely because it does not attack every conceivable phase of a problem. Petitioner asserts that the ban on plastic containers is valid as a "first step" in some future program in which presumably the environmentally inferior paperboard containers also will be prohibited. *Amicus* maintains, however, that the "step by step" analysis approved by this Court presumes, at the very least, that the *first step* be rationally related to the stated objectives of the Act.

For example, in *New Orleans* v. *Dukes,* 427 U.S. 297 (1976), this Court upheld the constitutionality of a city ordinance banning street vendors in the French Quarter. The ordinance contained a grandfather clause which exempted

"vendors who had operated within the Quarter for 8 years." This clause disqualified all vendors except two and was attacked as an arbitrary and irrational method of furthering the city's purpose of preserving the traditions of the French Quarter. The Court, however, noted that the ordinance was a proper step by step approach to a problem and that the city had eliminated most of the problem by eliminating all the vendors but two. The Court stated at 427 U.S. 297, 303-304:

> Legislatures may implement their program step by step, *Katzenbach* v. *Morgan,* 384 U.S. 641, 86 S.Ct. 1717, 16 L. Ed. 2d 828 (1969), in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations. See, *e.g. Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 488-489, 75 S.Ct. 461, 464-465, 99 L. Ed. 563 (1955).

New Orleans is readily distinguished.[1] The statute here in question does not represent any step toward the amelioration of an evil. It is essentially a step backward. It encourages the use

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[1] In *New Orleans,* the Court commented that, except for *Morey* v. *Doud,* 354 U.S. 457 (1957), there had been no other case in the last fifty years in which this Court invalidated a wholly economic regulation solely on equal protection grounds under the federal Constitution. However, state courts which are not subject to the interstate limitation of the Commerce Clause have regularly invalidated state economic regulations on equal protection grounds. *E.g., Louisville & Nashville Railroad Co.* v. *Faulkner,* 307 S.W. 2d 196 (Ky. 1957); *Price* v. *Amdal,* 256 N.W. 2d 461 (Minn. 1977); *State* v. *Lee,* 356 So. 2d 276 (Fla. 1978). Although state courts may not impose greater equal protection restrictions than this Court as a matter of federal constitutional law, *Oregon* v. *Haas,* 720 U.S. 714, 719 (1975), state courts have continued to use the equal protection rubric against economic discrimination "as some small degree of protection against this monopoly by minority." Paulsen, *The Persistence of Substantive Due Process in the States,* 34 MINN. L. REV. 91, 117 (1950). State preference for the equal protection rubric reflects the fact that state constitutions contain equal protection provisions which have been construed generally to parallel the federal but necessarily do not contain the equivalent of the Commerce Clause. Consequently, state concepts of equal protection are more readily applicable to commercial rights. *See* Minn. Const. Art. 1, § 2 (1974).

of a container that creates serious avoidable waste management problems. As the Minnesota Supreme Court realized, even under the "one step at a time" approach, the first step must be a forward one and must be one which is rationally related to the objectives of the Act. Since paperboard containers are environmentally inferior to plastic containers, and the Act encourages their use, the ban against plastic containers has no rational basis in fact and violates the Equal Protection Clause.

In considering any "first step" rational, it should be noted that the Act was not an experimental first treatment of the environmental concerns related to packaging. Prior to enactment of the statute in question, Minnesota adopted the Package Review Act, Minn. Stat. 116F.01-08 (1973), a comprehensive solid waste management law which provides for review by the Minnesota Pollution Control Agency of all packages marketed in the state. The stated goals of the Package Review Act are the same as those of the statute in question and in fact, specifically are referred to in § 116F.21. On September 7, 1979, *the same day* that the Supreme Court of Minnesota decided the instant case, it upheld the constitutionality of the Package Review Act in *Can Manufacturers' Institute* v. *State,* 289 N.W. 2d 416 (Minn. 1979). The Minnesota court praised that Act as a comprehensive and flexible means of implementing the goal of solid waste management and held that it did not violate the Commerce Clause. In practical effect, the absolute ban on plastic milk containers was an arbitrary exception to the Package Review Act which otherwise provides for comprehensive regulation of packaging materials based upon a reasonable evaluation of their environmental impact.

2. The Minnesota Statute Discriminates Against and Unduly Burdens Interstate Commerce.

As this Court stated recently in *Hughes* v. *Oklahoma,* 441 U.S. 322, 325-326 (1979):

> The few simple words of the Commerce Clause—"The Congress shall have power . . . to regulate commerce . . . among the several states . . ."—reflected a central concern of the Framers that was an immediate reason for calling the Constitutional convention: the conviction that in order to succeed, the new union would have to avoid the tendencies toward economic Balkanization that had plagued relation among the colonies and later among the states under the Articles of Confederation (citation omitted). The Commerce Clause has accordingly been interpreted by this Court not only as an authorization for congressional action, but, even in the absence of a conflicting federal statute, as a restriction on permissible state regulations.

In fulfilling this role, the Court has formulated a benefit-burden balancing test for evaluating state legislation. This test was first enunciated in *Pike* v. *Bruce Church Inc.*, 397 U.S. 137, 142 (1970) and has been used extensively by this Court in the past decade:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to putative local benefits. (citation omitted). If a legitimate local purpose is found, then the question becomes one of degree, and the extent of the burden that will be tolerated will of course depend on the nature of the local interests involved, and on whether it could have been promoted as well with a lesser impact on interstate activities.

Under this general rule, one first must examine the statute to determine if it regulates evenhandedly with only incidental effects on interstate commerce or if it discriminates against interstate commerce, either on its face or in its practical effect. While the Minnesota ban on plastic containers appears neutral

on its face, at least with respect to interstate commerce, it in fact places several substantial and impermissible burdens on interstate commerce.

First, out-of-state dairies that sell milk in Minnesota (represented by plaintiff Wells Dairy, Inc.) are prevented from selling their milk in the plastic containers in Minnesota. Second, out-of-state manufacturers and distributors of blow-molding equipment in interstate commerce (represented by plaintiff Uniloy, Inc.) are prevented from selling their equipment for the purpose of producing these milk containers for sale in Minnesota. Third, plaintiff Phillips Petroleum and all other out-of-state suppliers of polyethylene resin are prevented from selling their product for the purpose of manufacturing these containers for sale in Minnesota. The practical effect of these burdens is to bar the plastics industry from selling machinery and supplies for the manufacture of milk containers for sale in Minnesota.

The state legislators were quite candid in admitting that they wanted to stop the plastic industry before it got a foothold in the milk container business. (*See* Pet. Brief at 12-14 for quotes from the legislative debates). Incredibly, the petitioner, *amicus* Sierra Club and *amicus* United States not only admit this fact, but suggest that it was admirable of the legislature to do so.[2] The legislative history of the Act further demonstrates that the legislators openly sought to protect the local timber industry, "the third largest employer in the state", which supplies the pulpwood from which the paperboard containers were made. (Record at 112-115, 119-122, 129-130). The district court in fact ruled that the actual intent and effect of the Act was to promote the local pulpwood industry and certain

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[2] *See* Pet. Brief at 45-46, Sierra Club Brief at 7-8 and Brief of the United States at 18. Approval of the Package Review Act on the same day as the decision in this case belies the suggestions of *amici* that the decision of the Supreme Court of Minnesota was anti-environmental. *Can Manufacturers' Institute* v. *State,* 289 N.W. 2d 416 (Minn. 1979).

local dairies at the expense of the out-of-state dairies and plastics industry. "[T]he general principle [is] that the Commerce Clause prohibits a state from using its regulatory powers to protect its own citizens from competition." *Lewis* v. *B.T. Investment Managers,* ____ U.S. ____, 100 S. Ct. 2009, 2019 (1980).

The instant case is remarkably similar to *Hunt* v. *Washington State Apple Advertising Commission,* 432 U.S. 333 (1977) which invalidated a facially neutral North Carolina law regulating the marketing of apples. The Court stated that the practical effect of the statute was to unfairly discriminate against Washington state apples and further "to offer the North Carolina apple industry the very sort of protection against competing out-of-state products that the Commerce Clause was designed to prohibit."

Moreover, under the *Pike* test referred to earlier, it is necessary to determine whether the statute serves a legitimate state purpose. As discussed in Section 1, the stated goals of the statute, (i.e. solid waste management and conversation of energy and natural resources) fall within the ambit of legitimate state purposes. However, the inquiry cannot end there. State statutes even with ostensibly legitimate purposes have been invalidated as violative of the Commerce Clause. *See Philadelphia* v. *New Jersey,* 437 U.S. 617 (1978) (stated goal of waste management); *Hughes* v. *Oklahoma,* 441 U.S. 322 (1979) (stated goals of conservation of fish); *Hunt* v. *Washington State Apple Advertising Commission,* 432 U.S. 333 (1977) (stated goals of consumer protection). As this Court noted in *Hughes* v. *Oklahoma*:

> " . . . when considering the purpose of a challenged statute, this court is not bound by '[t]he name, description or characterization given it by the legislature and the courts of the State', but will determine for itself the practical impact of the law." 441 U.S. at 336.

Though the stated goals may be admirable, the evidence adduced at trial established that the banned plastic containers were environmentally superior to the unregulated paperboard containers which created a more serious waste management problem. Thus, the statute does not serve but rather hinders the stated goals. Again, the present case parallels *Hunt* v. *Washington State Apple Advertising Commission,* 432 U.S. 333 (1977), where the Court stated as follows:

> The several states unquestionably possess a substantial interest in protecting their citizens from confusion and deception in the marketing of foodstuffs but *the challenged statute does remarkably little to further that laudable state goal* . . . . Since the statute does nothing at all to purify the flow of information at the retail level, it does little to protect consumers against the problems it was designed to eliminate. 432 U.S. at 353 (emphasis supplied).

Finally, under the *Pike* test one must consider whether the statute's stated purpose could better be served by an alternative means that would not burden interstate commerce. For example, in *Philadelphia* v. *New Jersey,* 437 U.S. 617 (1978), the Court invalidated a New Jersey statute that prohibited the importation of most "solid or liquid waste which originated or was collected outside the territorial limits of the state." The Court observed that the statute's goal of reducing waste management problems might have been served by some means other than an outright ban on these wastes:

> Thus it does not matter whether the ultimate aim of ch. 363 is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution, for we assume New Jersey has every right to protect its resident's pocketbooks as well as their environment. *And it may be assumed as well that New Jersey may pursue those ends by slowing the flow of all waste into the state's remaining landfills even though interstate commerce may incidentally be affected.* But whatever New Jersey's ultimate purpose, it may not

> be accompanied by discriminating against articles of commerce coming down outside the state, unless there is some reason, apart from their origin to treat them differently. 437 U.S. at 626-627. (additional emphasis supplied)

Although the New Jersey statute facially discriminated against interstate commerce and the Minnesota statute appears facially neutral, they are similar in their total irrevocable bans on articles of commerce.

One alternative means of solving waste disposal problems is demonstrated in the Package Review Act which was upheld in *Can Manufacturers' Institute* v. *State,* 289 N.W. 2d 416 (Minn. 1979). The Minnesota Supreme Court noted that this Act was both a comprehensive and flexible method of dealing with the solid waste disposal problem. Safeguards were built into the Package Act and its regulations to protect against an unfair or arbitrary ban by the Minnesota Pollution Control Agency on the sale of a package. First, the agency decision could be reviewed by the Minnesota Environmental Quality Board. Second, if the Board did not reverse the agency decision, then the ban would only continue until the last day of the next following legislative session unless the ban was explicitly extended by law. Minn. Stat. § 116F.06 subdiv. 2.

The Minnesota court found that this scheme regulated evenhandedly and did not discriminate in favor of local interests. Although the Package Review Act contains a grandfather clause for containers selling in the state before May 25, 1973, which includes the plastic milk container in question, the act is an example of the type of alternative legislation that would better serve the state's goals and provide an appropriate factual record and informed agency guidance for specific legislative actions.

Another alternative method of serving the goal would be to place a tax on both paperboard and plastic containers that are not recyclable to encourage the development and production of recyclable containers and recycling programs.

In sum, the Minnesota ban on plastic milk containers not only fails to meet the rational basis test required by the Equal Protection Clause but also fails to meet the three criteria of the benefit-burden balancing test required to sustain state legislation under the Commerce Clause.

CONCLUSION

For the foregoing reasons, the judgment of the Minnesota Supreme Court should be affirmed.

Respectfully submitted,

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